IN THE SOLOMON ISLANDS
COURT OF APPEAL Criminal Appeal No. 2 of 1993

Connolly P.
Savage J.A
Williams J.A

CRIMINAL JURISDICTION

BETWEEN: **BEN TOFOLA** **Appellant**

AND: **REGINAM** **Respondent**

JUDGMENT OF THE COURT

Delivered the 29th day of October 1993

This is an appeal against convictions. The appellant Ben Tofola and another man, Rurugeni Nanau, were jointly charged with the murder of a nine year old boy, Duddley Beni, at Oloa Tambu site, Malaita Province, on the 11 March 1992. Rurugeni Nanau was referred to in the evidence as the appellant's brother, but we were told from the bar that this was not so. He was kin of some nature, perhaps a cousin. They were tried together before the High Court at Honiara on the 2nd and 3rd December 1992. Judgment was reserved and was delivered on the 14 December 1992. Both accused were convicted and in terms of the Penal Code were sentenced to life imprisonment. Ben Tofola has appealed against his conviction; Rurugeni Nanau has not.

The appeal was called before this court on Monday 25 October. Mr. Mwanesalua, the Director of Public Prosecutions, appeared for the Crown; the appellant was in person. Prior to the case being called members of the court had read the papers and were

concerned as to certain aspects of the appeal. Accordingly at the direction of the President a request was made to the Public Solicitors Office for assistance and Mr. Remobatu appeared. Mr. Remobatu had appeared for both the appellant and Rurugeni Nanau at the trial and very helpfully, at the courts request, agreed to appear for the appellant on the appeal. The hearing was adjourned to Wednesday the 27th October and Counsel were supplied with a note of the matters which had concerned the Court. Counsel were advised, however that they were free to raise whatever matters they thought proper. The hearing was resumed on Wednesday 27th and the Court would like to record its gratitude to Mr. Remobatu for his assistance to it in appearing for the appellant at such short notice and to Mr Mwanesalua for his detached assistance in respect of the points raised by the court.

The court has reached the conclusion that the appeal should be allowed, the conviction quashed, and a new trial ordered. In these circumstances it is not intended to canvas the facts fully in this judgment lest our comments have an inhibiting affect upon the evidence given at the retrial; we shall refer only to those that are necessary to show how we have arrived at the conclusion we have.

A man named Barnabus Siale, who lived in Maravovo village, Lau Lagoon went to work in his garden, presumably a distance from the village. A little later he was joined by a man who called himself Tagini but was in fact the prisoner Rurugeni Nanau, the appellants (sic) brother. A little later still three of Siale's children, including Duddley Beni, joined the father. Eventually by means of a pretext Rurugeni Nanau took the boy away with him. They did not return. Siale went searching and the next day reported his son's disappearance to the police. A police search was mounted but the boy was not found. The following day the search was resumed and the next day a police party accompanied by the appellant continued the search. At a particular place the appellant told the police officer to look under a particular tree. The body of Duddley Beni was found there. He was dead and his death was attributable to severe wounds to both sides of his neck and his head.

The police soon arrested Rurugeni Nanau, who in time made statements admitting killing the boy and implicating the appellant. The appellant denied his involvement to the Police. Several days later on the 22 April the Police saw the appellant again and he was taken to Auki Police Station. The officer in charge of the case said in evidence that he arrested the appellant. He was kept at Auki Station overnight. It would seem that the next day, the 23rd, Rurugeni and the appellant were put together in the CID Office and Rurugeni recounted his story of what had happened. The appellant apparently denied that what Rurugeni had said was true, presumably so far as it implicated him. He was then returned to custody. The next day the 24th the appellant was interviewed. He eventually made a statement; at first he repeated his denial of

being implicated. A further meeting between Rurugeni and the appellant was arranged; this lasted some 20 - 25 minutes. The appellant then made a statement which included admissions of his involvement in the killing. The record does not show at what stage the appellant was charged but it certainly seems clear he must have been in custody for at least a period approaching three days before he was brought before a court.

The Crown case at the trial was along the above lines. No objection was taken to the admissibility of the confessional statement taken from Rurugeni Nanau but when the Police Officer involved, Det. Sgt. Gregson Angisia, started to produce the appellant's confessional statement his Counsel, Mr Remobatu, stated he would be challenging it. The record, however, shows that the Det. Sgt. read the statement to the court. Mr Remobatu then cross examined him; the cross examination was directed to the voluntariness of the confessional statement, the alleged use of force by another police officer named Auga, the meetings or confrontations between the two brothers (sic) and a number of other matters. Mr. Mwanesalua then re-examined the Det. Sgt. and when he had finished called another Police Officer whose role had been, in effect, to act as witness of the interview of the appellant conducted by Det.Sgt. Angisia. He was cross examined by Mr Remobatu.

The record then shows that Counsel agreed, and the court accepted, that a medical report and an identification parade report, be admitted as evidence pursuant to section 180A of the Criminal Procedure Code and Mr. Mwanesalua then said that was the prosecution's case. Mr. Remobatu informed the court he made no submission "at this stage". The learned trial Judge then said "I find there is a prima facie case against both accused." Mr. Remobatu said that the accused Rurugeni would not be giving evidence. He then said;

> *"As far as Tofola is concerned, he will give evidence on the voir dire and will not be giving evidence on the main trial."*

The reference to the voir dire is the first reference to it in the record. The court adjourned at that point to 9.30 am the next morning.

Next day Mr. Remobatu called the appellant. He gave evidence at some length and it included allegations that when being spoken to by a Sgt. Auga and an officer from Kwaio he was in affect threatened by them and then punched by Sgt. Auga. He said he was frightened. He was then cross examined by Mr. Mwanesalua and re-examined by Mr. Remobatu. At the conclusion of that evidence Mr Remobatu said that was his evidence on the voir dire and that both accused would not be giving evidence.

Submissions followed: Mr. Mwanesalua for the Crown made in effect a final address on

the whole case and dealt in particular with the ruling the court was to make on the voir dire . Mr Remobatu then addressed on the whole case. He started with submissions in respect of the admissibility of the appellants statement, relying upon the alleged assault and threats and, generally, the way he had been treated before the statement was made. He dealt with questions of credibility and of witnesses that the Crown might have called but did not. He accepted the evidence against Rurugeni and his confession and contented himself with submitting that so far as Rurugeni was concerned the only matter for the determination was whether the evidence established all the elements of murder.

After Mr. Remobatu had finished his address Mr. Mwanesalua made a further address to the court and canvassed a number of matters arising out of Mr. Mwanesalua's address. The court then adjourned to the 14th December at which date judgment would be given.

This court appreciates that the record before it is not a verbatim one but there is sufficient to show that, no doubt by mischance, the procedure at the trial had gone fatally wrong. We recognise that this was a trial without a jury and therefore the courts approach to a voir dire to determine whether a statement is admissible or not, will quite properly be rather different from the course that is followed when there is a jury, but we are satisfied that the course followed here is not acceptable. It is clear that the disputed statement made by the appellant was admitted, in effect, as part of the crown's evidence on its whole case before the court had ruled whether it was admissible or not. The learned trial judge held there was a prima facie case against both accused when, without the appellants statement there was arguably no such prima facie case against him. This ruling was made before the appellant gave evidence on the voir dire and there certainly had not been a ruling that the statement was admissible.

This court is of the view that the wrong course adopted at the trial in relation to the objection to the admissibility of the statement led to the procedural and substantive errors that are now apparent. Apart from other flaws that we see it is fundamentally unacceptable that defence counsel should not know whether his client's statement to the police is to be admitted or not. His conduct of the defence case and his final submission, if he is to make a proper defence, must defend upon whether a confessional statement is to be admitted or not.

We think it will be helpful if we now set out courses that may be acceptably followed when there is a challenge to the admissibility of an accused's statement. The challenge may be either on the grounds of non-voluntariness or that in its discretion the Court should refuse to admit the statement as having been unfairly obtained or that its use would in some other way be unfair. In the former case there is a positive evidential burden on the Crown to prove voluntariness; in the latter case the accused must be able

to point to some material in the evidence, either that which had already been given, or which was called by either party on the voir dire, which will satisfy the Court that admitting the evidence would be unfair. It may be that before the trial commences defence counsel advises the prosecution that a statement's admissibility is to be challenged, or it may not be disclosed until the Police officer who is to produce the statement gives evidence. In the former case Counsel may agree that the judge be asked to rule before the trial gets fully under way. In that case after the accused has been araigned but before the Crown makes the opening address the judge holds the voir dire and rules upon whether the statement is to be admitted or not. In the latter case, and this is probably the more usual case, once counsel indicates that the admissibility of the statement is challenged evidence in chief stops, and evidence on the voir dire is taken. In either case the judge should require defence counsel, in the absence of the Police Officer concerned, to specify the grounds on which the statement is challenged. Counsel should then call the Police Officer and lead his evidence in relation to the statement and the grounds upon which its is challenged, which of course is subject to cross-examination. Crown Counsel may then call such other witnesses as he thinks proper on the issues raised in the challenge to admissibility. When the crown has given its evidence the defence may call such witnesses as it thinks proper, including the accused, on the issues raised on the challenge to admissibility, which may very well not cover all the matters arising upon the charge the accused faces. Counsel then address and the court rules on whether the statement is admissable. After the ruling, the Police officer who was giving evidence when the admissibility of the statement was challenged resumes giving evidence at the point where the challenge was made.

It appears that the practice in Papua New Guinea is to treat evidence given on the voir dire as evidence on the trial except that which is validly objected to by counsel and, ordinarily, that would be by counsel for the defence who may well have had to call witnesses, including the accused, in support of the grounds of his objection to the admissibility of the confessional statements. See R -v- Amo Amuna 1963 P & NGLR 22 at p27, R -v- Minai 1963 P & NGLR 195 at p.201, The State -v- Kusap Kei Kuya 1983 PNGLR 263 at 270; The State -v- Pai (1987) LRC (Crim.)256. The latter case seems to suggest that the approach applies only to the prosecution evidence. Whatever be the actual position as to the practice in Papua New Guinea it is our view that the appropriate course to follow is to treat the prosecution evidence on the voir dire as evidence on the trial, unless counsel object and obtain a ruling from the judge that it should not be so treated; and that the defence evidence be not so treated unless Defence Counsel agree that it should be so treated and also that the defence call the witness or witnesses concerned. The reason why the witness must also give evidence is that cross-examination on the voir dire is limited to matters relevant to the issues raised on the question of admissibility but if an accused or his witnesses give evidence as a part of the defence case they are open to be cross-examined on all issues. The accused should

not be able to gain an advantage by calling evidence on a voir dire, use it as a part of the defence and yet avoid cross examination on all the issues.

At the conclusion of the Crown case the normal procedure is followed. Defence counsel opens his case knowing exactly what the evidence is against his client. The accused may or may not give evidence; if he does then Counsel and the judge may accept that the evidence he gave on the voir dire be treated as part of his evidence for the defence and he may add to it and be subject to cross-examination in the usual way. On the other hand if he does not give evidence then what he said on the voir dire should not be referred to by counsel and the judge should put it out of his consideration of the case. The same approach should apply to any other defence witnesses who gave evidence on the voir dire.

In concluding our observations on this part of the case we draw attention to s.268(2) and s.273 of the Criminal Procedure Code. It appears to us that s.268(2) clearly reinforces, in statutory form, the views we have expressed earlier in this judgment as to the need for it to be clearly determined what evidence has been admitted as part of the prosecution case. At the conclusion of the prosecution case, in terms of the section, the court if it considers there is evidence that the accused person committed the offence, in other words if a prima facie case has been established, shall inform the accused of his right to address the court, to make an unsworn statement, give evidence and call other witnesses. The Court shall call upon him or his counsel to state whether he intends to call evidence or not. He cannot properly do this if he does not know exactly what evidence there is admitted against him. (Generally see Francis & Parry (1959) 43 CAR 174.

S.273 of the Criminal Procedure Code supplemented by s.272 and s.143, prescribes the order of final addresses. Here in view of defence Counsel's indication that he was not calling any evidence, Crown Counsel should not have made a second address. It may have been that at that point, due to the way the voir dire had been conducted Counsel thought there was a right to reply on the voir issue, but in all the circumstances it seems to us that these addresses were treated as final addresses and the Crown should not have replied. It is, we think, one of the consequences which flowed, as we have earlier observed, from the wrong course being followed in respect of the voir dire.

We now deal shortly with some other matters. There was a challenge, though the grounds of the challenge do not appear to have been very precisely formulated, to the statement made by the Appellant. The grounds, however, appear to have been, first, that the statement was not made voluntarily and second that even if it had been so made the court should, in its refuse discretion, refuse to allow it to be admitted because it would be unfair to do so. On the matter of voluntariness the learned trial judge

correctly enunciated the law applicable, subject to what is said below, and made some clear findings of fact. He expressly held that he did not believe the appellant's account of the alleged assaults and threats and this, of course, he was entitled to do. It seems to us, however that it would have been desirable for there to have been some more evidence taken upon the matter. The accused expressly stated that the assault upon him was by a Sgt. Auga and the only other person present at that time was the police officer from Kwaio; neither of these officers was called on the voir dire. It has often being said it is the duty of the prosecution to call all the relevant evidence in carrying out its task of proving the voluntariness of the statement. It can hardly be said that it did this here; the only two direct participants in the alleged assault were not called. It may well be that this failure is attributable to the defence failing to give adequate particulars of its grounds of challenge to the statement. Indeed the learned trial judge drew this matter to the attention of Counsel when he said that if it had been indicated earlier that certain witnesses were required he would have arranged for their attendance. However, in the circumstances we record the view that it would be difficult to arrive at a firm decision about the assault without hearing from the other two participants, namely, Sgt. Auga and the officer from Kwaio because as the evidence stood the appellant's version was unchallenged by any one who had been present when it was alleged to have occurred. On the retrial the judge should not be placed in that difficulty and will be able to make his own assessment on all the evidence. In respect to this aspect of the matter we refer to a misstatement of the law contained in the judgment. The learned trial judge said, at p.30 of the record,

> "Although there is no requirement from the defence to satisfy the court of the voluntariness of the statement, the defence must nevertheless satisfy the court by evidence that the alleged assault or threat occurred"

If the learned Chief Justice was referring to what might be described as the evidential burden on the accused to point to some evidence which supports his contention, and which may raise in the judge's mind a doubt to the effect that the assault may in fact may have occurred, it is not incorrect; but the plain language suggests there was a burden on the accused to adduce evidence to establish affirmatively that the assault occurred. That would not be correct. All that is required is that the accused point to some evidence which could raise a doubt in the judge's mind; whether the evidence relied upon does raise such a doubt is a matter for the judge in his assessment of the evidence. Further, it is of course a matter for him to decide on the evidence before him whether, even if satisfied an assault took place, that it had the effect of making the appellant's statement not a voluntary one. These are all questions which the judge on the retrial will have to determine on the evidence then before him.

A final matter that has concerned the court and which will have to be determined by

the judge on the retrial, on the basis of the evidence then given, concerns the manner in which the appellant was on two occassions confronted, to use the police officers own language, by his (sic) brother the co-accused Rurugeni Nanau before he made his confessional statement. It is recognised that Rule 8 of the old Judge's Rules, which would have been applicable in these circumstances, no longer formally applies as a part of the guidelines that judges use in deciding upon fairness. The old Judge's Rules have been replaced by Rules made by the Chief Justice in, we understand, 1982. Those Rules, which for want of a better name may be referred to as the Solomon Islands Judge's Rules, do not contain an equivalent Rule to Rule 8 of the old Rules. It is our view, however, that in considering whether a challenge to a confessional statement made in circumstances to which the old Rule 8 would have applied, a Judge is likely to have regard to the approach taken by the old Rule since its purpose, and the reasons for it, still remain as sound as ever.

A breach of the old Judge's Rules or the new Solomon Islands Judge's Rules does not automatically mean that a statement must be excluded; the Rules were, and are, rules of guidance, not of law, to assist the court in deciding upon the matter of fairness in the circumstances. The Judge on the retrial will have to determine whether in the circumstances what was done here would make admitting the appellants statement unfair. It would, of course, have been possible for the police officer merely to have read to the appellant the contents of Rurugeni's statement - indeed it appears that at one stage he did - but he chose to mount two confrontations in person between these two (sic) brothers. The retrial judge may well need to have some evidence of the relationship between the two men - their ages, personality and attitude to each other to determine whether there was any likelihood of intimidation arising from the confrontation. It will be a matter for him to decide in the light of the evidence then before him.

Mr Mwanesalua took the point that the appeal was lodged out of time. In such a serious case as this and in light of the fact that the appellant was unrepresented until the case came before this Court we do not think such weight should be placed upon this failure. We are satisfied that there ought to be an extension of time given in which to lodge the appeal and, accordingly, grant such extension as is necessary to permit this appeal to be properly lodged.

In view of the matters dealt with in this judgment we are satisfied the judgment of guilty must be regarded as unsafe and unsatisfactory and, as already stated, the conviction is accordingly quashed and a new trial ordered.

FOR THE COURT

SAVAGE J.A